

January 4, 2010

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Dear XXXXX:

This is in response to your July 15, 2009 letter to Patricia Guard of the Office of Special Education Programs regarding procedures that you received from a Special Education Local Planning Area (SELPA) in California related to independent educational evaluations (IEEs). You have asked whether specific parts of these procedures, which are enclosed with your letter, are consistent with the requirements in Part B of the Individuals with Disabilities Education Act (IDEA) and its implementing regulations at 34 CFR Part 300.

Request for an IEE at Public Expense: You have asked if the following procedures are consistent with IDEA and its implementing regulations:

“The district does not have an obligation to reimburse parent for private evaluations obtained prior to the date that the district’s evaluation is completed and discussed in an IEP [individualized education program] meeting or prior to the parent’s written disagreement with the district’s evaluation or notice of their request for an IEE in the IEP meeting which must be considered by the IEP team.” (Page one of the SELPA’s procedures)

OSEP’s Response: Under 34 CFR §300.502(b)(1), a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in 34 CFR §300.502(b)(2)-(4). Therefore, it is consistent with 34 CFR §300.502(b)(1) to state that the district would not have to reimburse the parent for an IEE obtained prior to the completion of the district’s evaluation. If, after completion of the public agency’s evaluation, a parent requests an IEE at public expense, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate, or ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing pursuant to a due process complaint that the evaluation obtained by the parent did not meet agency criteria. 34 CFR §300.502(b)(2). If a parent requests an IEE, the public agency may ask for the parent’s reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the IEE at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation. 34 CFR §300.502(b)(4). There is no Federal requirement that a parent notify the public agency in writing or in an IEP meeting that the parent will be requesting an IEE at public expense. While it is reasonable for a public agency to require that it be notified prior to the parent obtaining an IEE at public expense, it is inconsistent with 34 CFR §300.502 to deny reimbursement prior to discussion of the district’s evaluation at an IEP meeting, or to require the parent to provide a written statement of its

disagreement with the district's evaluation, or to provide notice of their request for an IEE in an IEP team meeting for consideration by the IEP team.

Reimbursement for an IEE: You have also asked if the following underlined procedures are consistent with IDEA and its implementing regulations:

The district may reimburse parent for private evaluations outside of this policy in any one of three circumstances:

- (a) All of the following conditions have been met:
 - The parent disagreed with the district's evaluation in writing or gave notice his/her disagreement in the IEP meeting,
 - The private evaluation meets the criteria contained in this policy,
 - The parent provides a copy of the written report and written consent to exchange information, and
 - The examiner attends the relevant IEP meeting by phone or in person to discuss the findings and provides copies of all protocols to the district, or
- (b) The district's evaluation has not been provided in compliance with the law; or
- (c) The privately obtained evaluation assessed the student in an area of suspected disability, which was not assessed by the district. (Page 2 of the SELPA's procedures)

OSEP's Response: The IDEA regulations include the agency criteria and parent's right to evaluation at public expense. Under 34 CFR §300.502(e), if an IEE is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE. Except for these criteria, a public agency may not impose conditions or timelines related to obtaining an IEE at public expense. As noted above, a public agency can file a request for a due process hearing to show that its evaluation is appropriate or to demonstrate that the IEE obtained by the parent did not meet agency criteria. 34 CFR §300.502(b)(2).

You contend that conditioning reimbursement on the parent providing written consent to exchange information is inconsistent with the IDEA and that such exchange of information violates privacy rights provided under the Health Insurance Portability and Accountability Act (HIPAA). Under 34 CFR §300.502(c), if the parent obtains an IEE at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of a free appropriate public education (FAPE) to the child. Parental consent would be required under 34 CFR §300.622(a) for a public agency to release education records to the independent examiner who conducted the IEE, since the independent examiner is not an official of a participating agency. However, IDEA and its implementing regulations do not address whether parental consent would be required for the independent examiner to provide the results of the IEE to the district. This office is not in a position to express an opinion on whether it would violate HIPAA, or any State laws, for an independent examiner to disclose the results of an IEE to the district without parental consent. If written consent is required for the

independent examiner to provide the results of the IEE to the district and the parent refuses to provide consent, thereby denying the district access to information in the IEE, it is not inconsistent with IDEA for the district to deny reimbursement for the IEE since it will be unable to consider the results of the IEE.

You also contend that attendance by the independent examiner at the IEP meeting where the IEE is discussed, as well as providing copies of the protocols, are not required by Federal law. Under 34 CFR §300.321(a)(5), the IEP team must include an individual who can interpret the instructional implications of evaluation results. This individual does not have to be the person who conducted the evaluation. It may be helpful for members of the IEP Team to speak with the independent examiner for clarifications, background information or to have other conversations about the information contained in the evaluation. However, 34 CFR §300.502(c) does not require that the independent examiner be present at the meeting where the results of the IEE are considered and while the district could request (and pay for) the examiner's participation, such participation cannot be required as a condition of considering the results of the evaluation in any decision made with respect to the provision of FAPE to the child.

The policy also requires, as a condition of reimbursement, that the examiner provide copies of all test protocols to the district, but does not define the term "test protocols." Test protocols commonly refer to written instructions on how a test must be administered and the questions. Generally these test protocols are original creations of independent authors and/or organizations. Therefore, they may be protected by the U.S. Copyright Act of 1976, the Digital Millennium Copyright Act of 1988, as well as other State, Federal, and international acts and conventions. If a given test protocol is copyrighted, it may not be reproduced, transmitted, distributed, publicly displayed, nor may a derivative work be created there from, without express permission from the copyright owner, unless such use is allowed under the Fair Use Doctrine. In many instances, the district will have access to the test protocols if it uses the same tests in its evaluations that the independent evaluator uses. If the district is not familiar with the test and needs to review the test protocols to determine if the IEE meets agency criteria, it can require that the independent evaluator provide an explanation of the test protocols. It is the independent evaluator's obligation to assess his/her rights in light of the intended use and satisfy any and all use restrictions, including, but not limited to those boundaries set forth in copyright and trademark law.

Finally, we read (b) and (c) as providing for reimbursement for an IEE if the district's evaluation was not provided in compliance with the law or did not assess a student in all areas related to the suspected disability. We believe that allowing reimbursement under these circumstances is consistent with 34 CFR §300.502.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

A copy of this letter is being provided to the State Director of Special Education in California to determine if these procedures are still in effect and, if so, to ensure that applicable changes are made to comply with the requirements of the IDEA and its implementing regulations at 34 CFR

§300.502. If you have further questions about this information, please do not hesitate to contact Melanie Byrd at 202-245-6568 or by email at Melanie.Byrd@ed.gov.

Sincerely,

/s/

Alexa Posny
Acting Director
Office of Special Education Programs

cc: Mary Hudler